IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	MDL No. 1917 Case No. C-07-5944-SC
This Order Relates To: Case No. 3:14-cv-02510 VIEWSONIC CORP. Plaintiff v. CHUNGHWA PICTURE TUBES, LTD., et al, Defendants.	ORDER GRANTING MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

Now before the Court is Panasonic's[1] motion to dismiss and compel arbitration of Direct Action Plaintiff ViewSonic Corporation's claims against Panasonic. ECF No. 2767 ("Mot."). ViewSonic opposes, ECF No. 2867 ("Opp'n"), and Panasonic filed a reply, ECF No. 2899 ("Reply"). After briefing was complete, ViewSonic sought leave to file a surreply, ECF No. 2916 ("Surreply

[1] For simplicity the Court refers to the movants as "Panasonic," although in fact the movants are Panasonic Corporation, Panasonic Corporation of North America, and MT Picture Display Company, Ltd.

Mot."), see also ECF No. 2916-2 ("Surreply"), which Panasonic opposes, ECF No. 2921 ("Surreply Opp'n").[2] Both motions are now fully briefed and appropriate for disposition without oral argument under Civil Local Rule 7-1(b). For the reasons set forth below, the motion for leave to file a surreply is GRANTED and the motion to dismiss and compel arbitration is GRANTED.

II. BACKGROUND

This is an antitrust case alleging price fixing in the Cathode Ray Tube (CRT) market. ViewSonic is a relatively late entrant to the case, and filed its complaint in May of 2014. ViewSonic alleges that Panasonic, among several other defendants, participated in a price fixing conspiracy in the CRT market between March 1, 1995 and November 25, 2007.

ViewSonic and Panasonic entered into an Original Equipment Manufacturer, or OEM, supply agreement in 1999 ("the Agreement"). ECF No. 2768 ("Hemlock Decl.") at Ex. A ("Agreement"). In the Agreement, the parties agreed to submit to arbitration "[a]ll disputes, controversies, claims or differences which may arise between the parties, out of or in relation to or in connection with this Agreement, or for the breach thereof . . . except as otherwise

[2] Panasonic's arguments against granting leave to file a surreply are well taken. The arguments in Panasonic's reply brief simply "respond[ed] to legal arguments made in opposition." Heil Co. v. Curotto Can Co., No. 04-cv-1590 MMC, 2004 WL 2600134, at *1 n.1 (N.D. Cal. Nov. 16, 2004). Nonetheless, in the interests of completeness and judicial efficiency, the Court GRANTS leave to file the surreply. Had ViewSonic not filed its surreply, the Court would have simply requested supplemental briefing on the very issues it addressed, therefore there is no reason to deny leave to file the surreply only to then request additional briefing on these issues.

provided herein."[3] Agreement at § 17.3.

Neither party argues that the Agreement or the arbitration clause is invalid. Instead, both sides disagree over the length of time covered by the Agreement and the scope of the arbitration clause, as well as whether those issues should be resolved by the Court or in arbitration.

III. LEGAL STANDARD

Section 4 of the Federal Arbitration Act ("FAA") permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for any order directing that . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4.

The FAA embodies a policy that generally favors arbitration agreements. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Federal courts must enforce arbitration

[3] The Court notes that the Agreement along with numerous other portions of the parties' submission have been filed under seal. While the Court has previously expressed a liberal attitude toward motions for leave to file under seal in this matter, citing the enormous administrative burden that would be required if the Court were to review and closely analyze every claim of sealability, see ECF No. 1512, some of the parties' submissions on this motion, particularly ViewSonic's, stretch the bounds of even that leeway. For instance, the Court cannot imagine any reason why the words "arbitration clause" would be sealable or why the existence of an arbitration clause should be treated as confidential given that this is quite obviously a motion to compel arbitration. See Opp'n at 2:15, 2:23. Furthermore, even sealing the entire text of the arbitration clause seems overly broad given that (1) the terms of the arbitration clause itself are largely unremarkable boilerplate, and (2) the Court has to analyze the text of the clause in the context of the motion anyway. In short, the Court wishes to reminds the parties that while the Court has taken a liberal attitude towards motions to file under seal thus far, that leeway should not be abused.

agreements rigorously. See Hall St. Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008). Courts must also resolve any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989). These policies all "appl[y] with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

IV. DISCUSSION

The parties agree that the Agreement and the arbitration clause are valid and cover at least some set of ViewSonic's claims. The remaining issues relate to the scope and interpretation of the Agreement, and the threshold question of whether those scope and interpretation issues should be resolved by the Court or in arbitration.

Borrowing somewhat from the Supreme Court's rubric in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995), the parties have three types of disagreements in this case. First, ViewSonic and Panasonic disagree about whether Panasonic is liable to ViewSonic for price fixing in the CRT market. "That disagreement makes up the merits of the dispute." Id. (emphasis omitted). Second, they disagree about what portion of the merits they agreed to arbitrate. In arbitration parlance, this is a disagreement about the "arbitrability" of the dispute. Id. (emphasis omitted). Finally, they disagree about whether the Court or the arbitrator has the power to decide the second matter. In other words, who decides how much of this dispute the parties

agreed to arbitrate, the Court or the arbitrator? This is sometimes referred to as "jurisdiction to determine arbitrability." See Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733, 738 (9th Cir. 2014).

Because the Court finds the arbitrator and not the Court has jurisdiction to determine arbitrability, the Court only addresses that point.

A. Jurisdiction to Determine Arbitrability

"Both the arbitrability of the merits of a dispute and the question of who has the primary power to decide arbitrability depend on the agreement of the parties." Goldman, Sachs, 747 F.3d at 738 (citing First Options, 514 U.S. at 943). However, "unlike the arbitrability of claims in general, whether the court or the arbitrator decides arbitrability is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1072 (9th Cir. 2013) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)) (emphasis in original). The rule seeks to avoid "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. First Options, 514 U.S. at 945 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960)).

Panasonic makes two arguments in favor of leaving the question of arbitrability to the arbitration panel. First, Panasonic points to cases suggesting that "as a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself . . . or a like defense to arbitrability."

Second, Panasonic argues that the arbitration clause's references to the rules of procedure of the American Arbitration Association's ("AAA") and the Japan Commercial Arbitration Association ("JCAA") -- rules that (in Panasonic's view) expressly provide for arbitrators to decide arbitrability -- indicate the parties unmistakably intended the arbitrators, not the Court to decide arbitrability.

Panasonic's first argument is a non-starter. For the most part, Panasonic misses or ignores the applicable case law and instead seizes on a few out-of-context passages from cases that do not address the question of who decides arbitrability. Instead, the rule is clear: unless the parties clearly and unmistakably provide otherwise, the Court decides who determines questions of arbitrability. See Goldman, Sachs, 747 F.3d at 738. As a result, Panasonic's points about the Court "ignor[ing] the Arbitration Act and . . . 'becom[ing] entangled in the construction' of the OEM Agreement," Reply at 2, are entirely misplaced unless Panasonic shows the parties' intent to resolve those questions in arbitration.

Panasonic's second argument, that the reference in the arbitration clause to the rules of procedure for the AAA and JCAA evince the parties' intent to arbitrate arbitrability, fares far better. Cases hold that "where the parties' agreement to arbitrate includes an agreement to follow a particular set of arbitration rules -- such as the AAA Rules -- that provide for the arbitrator to decide questions of arbitrability, the presumption that courts decide arbitrability falls away, and the issue is decided by the arbitrator." Bank of Am., N.A. v. Micheletti Family P'ship, No.

08-02902 JSW, 2008 WL 4571245, at *6 (N.D. Cal. Oct. 14, 2008) (collecting cases). The arbitration clause at issue here provides that if Panasonic initiates arbitration, it will be governed by the AAA rules and take place in California. If, on the other hand, ViewSonic initiates the arbitration, it will be governed by the JCAA rules and take place in Osaka, Japan. As Panasonic points out, both the AAA and JCAA rules allow arbitrators to determine their own jurisdiction.[4]

Nonetheless, ViewSonic raises three arguments to the contrary. First, relying on Howsam v. Dean Witter Reynolds, Inc., ViewSonic argues that the question of whether it intended to arbitrate claims based on purchases made prior to the March 12, 1999 execution of the Agreement is "a gateway dispute about whether the parties are bound by a given arbitration clause [that] raises a 'question of arbitrability' for a court to decide." 537 U.S. at 84. This argument misses Panasonic's point. Panasonic is arguing that by referring to the AAA and JCAA rules in the arbitration clause, the parties clearly and unmistakably indicated that the arbitrator, not the Court should resolve questions of arbitrability. If that is true, the result is obvious. "The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide

[4] AAA Rule 7 states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Similarly, JCAA Rule 41 states that "[t]he arbitral tribunal may make a determination on any objection as to the existence or validity of an Arbitration Agreement and any other matters regarding its own jurisdiction."

otherwise.'" See id. at 83 (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)) (original emphasis omitted and emphasis added). Put another way, only if the Court determines that it, and not the arbitrators, has jurisdiction to determine what parts of the dispute are arbitrable does the Court actually resolve what claims the parties intended to submit to arbitration.

Second, ViewSonic relies on United Parcel Service v. Lexington Insurance Group, No. 12 Civ. 7961 (SAS), 2013 WL 1897777, at *2 (S.D.N.Y. May 7, 2013), which found that because the parties' agreement only incorporated the AAA's procedural rules, there was no clear and unmistakable evidence the parties intended to arbitrate arbitrability, because "[t]he primary question of arbitrability is a substantive one." Here, the arbitration clause provides that the arbitration will take place "in accordance with the rule [sic] of procedure of the [AAA]." Agreement at § 17.3. Admittedly, this clause is less clear than in other cases finding intent to arbitrate arbitrability in arbitration clauses that incorporated a third party's arbitration rules (including those on jurisdiction). See, e.g., Oracle, 724 F.3d at 1071 (designating that the arbitration shall take place "in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL)"); Poponin v. Virtual Pro, Inc., No. C 06-4019 PJH, 2006 WL 2691418, at *9 (N.D. Cal. Sept. 20, 2006) (addressing an agreement that incorporated the rules of the International Chamber of Commerce Court of Arbitration). Further complicating matters, as far as the Court can determine, there is no set of exclusively "procedural" (or exclusively "substantive") AAA rules. Nonetheless, another court has found that Rule 7, which governs

jurisdiction to determine arbitrability, is a procedural rule of the AAA. See Citifinancial, Inc. v. Newton, 359 F. Supp. 2d 545, 551-52 (S.D. Miss. Mar. 4, 2005). In light of that case and the substantial weight of authority finding that incorporating AAA or other arbitration rules constitutes "clear and unmistakable" evidence of intent to resolve arbitrability before the arbitral panel, the Court finds United Parcel Service unpersuasive. See Oracle, 724 F.3d at 1071 ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.") (collecting cases).

Finally, ViewSonic argues that the relevant AAA rule, Rule 7, only came into existence in 2000, after the Agreement was executed. As a result, ViewSonic believes it would be inappropriate to infer any intent to arbitrate arbitrability from the parties' arbitration clause. See Yahoo! Inc. v. Iversen, 836 F. Supp. 2d 1007, 1011-12 (N.D. Cal. 2011) (discussing the rules in effect when the parties entered into their agreement). In support of this proposition, ViewSonic cites Gilbert Street Developers, LLC v. La Quinta Homes, LLC, 174 Cal. App. 4th 1185 (Cal. Ct. App. 2009), which stated that "in 1998 . . . the American Arbitration Association had no rule providing that arbitrators had jurisdiction to rule on their own jurisdiction. However, in September 2000, the American Arbitration Association adopted a new rule, R-8(a), that provided arbitrators could rule on their own jurisdiction." Id. at 1187-88 (citing Hasbro, Inc. v. Amron, 419 F. Supp. 2d 678, 685 (E.D. Pa. 2006)). For whatever reason, the Gilbert Street Court was mistaken about

those facts. As Panasonic points out, providing copies of the relevant rules, the precursor to Rule 7 was in effect as of at least January 1, 1999 -- prior to the execution of the Agreement. See ECF No. 2921-1 ("Supp. Hemlock Decl.") at Exs. A-B. As a result, there is no temporal issue with concluding that the parties' decision to incorporate the AAA and JCAA rules reflected their intent to arbitrate questions of arbitrability.

Because ViewSonic's arguments are unavailing, the Court finds that jurisdiction to determine arbitrability lies with the arbitrator.

V. CONCLUSION

Accordingly, the Court finds that by incorporating the rules of procedure of the AAA and JCAA, the parties "clearly and unmistakably" provided for arbitration of arbitrability, and as a result Panasonic's motion is GRANTED. Furthermore, because the Court lacks jurisdiction to determine arbitrability, and the parties agreed to resolve such issues before the arbitrators and pursuant to the AAA or JCAA rules, the Court lacks jurisdiction even to sever ViewSonic's claims against the co-conspirators from its claims against Panasonic. See Reply at 6 n.3. As a result, the Court DISMISSES ViewSonic's complaint WITHOUT PREJUDICE, and leaves those questions to the arbitrators.

IT IS SO ORDERED.

Dated: December 18, 2014

UNITED STATES DISTRICT JUDGE